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In The
SUPREME COURT OF THE UNITED STATES

No. 79-1131

21 TURTLE CREEK SQUARE, LTD.,
Petitioner,

vs.

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Promissory Estoppel and Traditional Contract Doctrine, The Yale Law Journal, Vol. 78, pg. 343, Jan. 1969 17

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In The
SUPREME COURT OF THE UNITED STATES

TERM

No. _____

21 TURTLE CREEK SQUARE, LTD.,
Petitioner,
vs.
NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

21 Turtle Creek Square, Ltd., the Petitioner herein, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on September 22, 1970, pursuant to a Petition for Rehearing granted in response to a judgment issued by the United States Court of Appeals for the Fifth Circuit on May 11, 1970. The last re-

ferred to judgment was rendered on the appeal of a judgment entered in said cause by the United States District Court for the Northern District of Texas on February 11, 1969.

I

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, rendered on September 22, 1970, has not yet been reported, officially or unofficially. It is printed in Appendix A hereto at page A1. The opinion of the Court of Appeals for the Fifth Circuit, entered on May 11, 1970, has been reported in 425 F. 2d 1380 and is printed in Appendix B hereto at page B1. The opinion of the United States District Court for the Northern District of Texas, entered on Februaudy 11, 1969, has not been reported, officially or unofficially, and is printed in Appendix C hereto at page C1.

II

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on September 22, 1970, in accordance with the Court's opinion filed the same date.

This judgment was rendered pursuant to a Petition for Rehearing granted on a judgment rendered by the same Court on May 11, 1970.

The statutory provisions conferring on the Supreme

Court jurisdiction to review the judgment in question by writ of Certiorari is 28 U.S.C., Sec. 1254(1)

III

QUESTION PRESENTED FOR REVIEW

In order for a party to be estopped to assert the Statute of Frauds under the Doctrine of Promissory Estoppel, as stated by Sec. 90, Restatement of Contracts, viz.:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.";

is it necessary that there be an additional promise, by the party to be estopped, to reduce the oral agreement to writing?

IV

CONSTITUTIONS OR STATUTES INVOLVED

This case involves no Federal or State constitutional provisions or treaties but does involve the application of the Texas Statute of Frauds, Vernon's Ann. Tex. Civ. St. Art. 3995.

V

STATEMENT OF THE CASE

The Petitioner, 21 Turtle Creek Square, Ltd., (21) is a Texas Limited Partnership, organized and existing

under and by virtue of the Uniform Limited Partnership Act of the State of Texas. Its principal place of business and offices are located in Dallas, Texas. This entity was formed for the purpose of owning and operating an apartment complex in Dallas, Texas, known as 21 Turtle Creek Square.

The Respondent, New York State Teachers' Retirement System, (Teachers) is a body corporate organized and existing under and by virtue of Article 502, *et seq.* of the Education Laws of the State of New York. Its offices and principal place of business are in Albany, New York. Teachers was the permanent lender in connection with the financing of the construction of the apartment project. This financing was insured by the Federal Housing Administration (FHA) under the provisions of the National Housing Act.

The Manhattan Construction Company of Oklahoma and Manhattan Construction Company of Texas (Manhattan) were the general contractors on the project under a joint venture composed of these companies and Dalmark Corporation. Dalmark was owned and controlled by Daniel Gevinson (Gevinson). Gevinson was also the former owner of all of the component interest of 21.

From August, 1964, Manhattan was represented almost exclusively by David M. Thornton (Thornton) an attorney at law, and Teachers was represented by Francis Trombly (Trombly) an attorney at law and by Gordon Furlong (Furlong) an Executive Officer of the National Commercial Bank and Trust Company of Albany, the interim construction lender (Bank).

The Bank owned ten per cent (10%) of the construction loan, ($9,910,900.00) and Teachers owned ninety per cent (90%). Teachers was also the permanent lender on the project. Bank was the agent of Teachers in making advances under the construction loan and Furlong was the executive officer of the Bank who handled all such advances, including the final one in November of 1964. Trombly and Furlong represented both the Bank and the Teachers at this closing. There was no necessity for representatives of the Teachers to be present at the final closing since the Bank, through Trombly and Furlong, closed the loan for the Teachers and after the closing the Bank, through Furlong, assigned the note and mortgage to the Teachers.

To clearly understand the position and the status of Trombly in this transaction, as well as Furlong, one must be acquainted with the facts concerning the construction of the apartment complex.

One John Hans Graham was retained by Gevinson as Architect for 21. At the initial closing, held in June of 1962, John Hans Graham executed a certificate that he had been paid in full and that he would not assert any lien or claim against the apartment complex. In April of 1963, John Hans Graham filed a lien against the apartment complex. This immediately caused the proceeds of the construction loan to be held up and further resulted in an investigation of the whole project by the General Accounting Office and by the Federal Bureau of Investigation. As a result of these investigations Gevinson was indicted and subsequently convicted for filing false information with the FHA to obtain

insurance. Sometime during the investigations Gevinson was removed by the FHA from the operating control of the apartment complex and Mr. C. A. Bullen of Manhattan was given the authority to make requests for payments and to make other decisions with respect to the construction of the project. Sometime in the Spring of 1964, Gevinson had assigned all of his interest in 21 to Kirkeby-Natus Corporation (Kirkeby-Natus) of New York City and had resigned as manager of the apartment complex. This latter corporation placed one of its officers in active control and even subsequently entered into a contract of sale of the apartment complex.

As a result of the investigation by the General Accounting Office, the FHA reviewed the construction costs and as a result thereof disallowed certain costs. The disallowance meant that such costs could not be certified and thus could not be paid out of mortgage proceeds. The disallowance also caused a shortage of mortgage proceeds to cover all costs of the project and, for a closing to take place, the sponsor would have to supply the funds to cover the unpaid costs. 21 and Gevinson did not have the funds nor was Kirkeby-Natus willing to supply them. This precipitated many conferences and long distance calls with both the Bank, i. e., Furlong, and Trombly, as well as a personal trip to Dallas by C. B. Murray (Murray) the Executive Director of the Teachers. Although Murray in his deposition denied that he was aware of any financial difficulty of either Gevinson or the project, there is attached to Joseph R. Munkwitz' deposition a memorandum dated May 15, 1964, which Murray filed with the Teachers reporting on a trip he had made to Dallas to interview Gev.

inson and stating that Gevinson had serious financial difficulty. Mr. E. J. Dee (Dee) of the FHA in his deposition confirms this fact.

From and after June of 1964, many meetings were held by Manhattan with Gevinson, with the FHA and with Trombly and Furlong relative to having a final closing of the loan. Neither Gevinson nor Kirkeby-Natus would admit to being the sponsor, i. e., owner, of the project and thus would not sign the necessary papers to close the permanent loan.

The loan was then in default and notice was given by Trombly on behalf of his client that foreclosure would take place unless a payment of interest was made on or before a specified date.

In August of 1964, Manhattan filed suit in the District Court of Tarrant County, Texas, 96th Judicial District, against 21, *et al.*, for foreclosure of its lien and for other relief. In that same month, on or about August 24, 1964, Thornton as Trustee for Manhattan obtained from Kirkeby-Natus all of its interest in the assignments made to it by Gevinson of his interest in 21. Manhattan did this so as to place itself in the position of owner and sponsor of 21 in order to close the loan on 21.

After many conferences with Trombly, some with Furlong, none with the Teachers, and many with FHA, Manhattan was accepted as the owner of the partnership interests of 21. During all of these negotiations, which culminated in 21 executing and closing the loan in November of 1964, 21 was represented by Thornton, D. M. Forten-

berry and C. A. Bullen. At no time did any of these individuals negotiate or even discuss with Teachers the many and various problems which were then in existence and which continued to exist even after the final closing. All negotiations and conferences were had with Trombly and sometimes with Furlong. At the closing in November of 1964, Teachers was represented by Trombly and Furlong. All closing papers were either executed by them and/or approved by them. However, all during this period of time the Teachers was being kept informed by Trombly.

The question of title, i. e., the ownership of the partnership interests of 21, was approved by Trombly as well as Furlong.

Prior to the final closing a moratorium on principal and interest of the permanent loan was negotiated by Thornton with Trombly. It was not until the early part of 1965 that any one associated with 21 either met or talked with other officials of Teachers. All of the problems that were raised and the questions that were asked were handled by Trombly and Furlong.

Manhattan was interested in having the loan closed because in the Summer of 1964 they owed in the neighborhood of $900,000.00 for material and labor incurred in the construction of the apartment complex. Even though Manhattan contributed a substantial sum of money (in excess of $350,000.00) over and above the final loan proceeds to pay off all debts of this project, they did in effect reduce their loss (by closing the loan) in an amount equal to approximately $350,000.00. The alternative to this was to be involved in long and tedious litigation with the FHA,

the Bank, and the Teachers, without any assurance or confidence that such litigation would reduce their losses to the extent that a closing of the loan would have done. The project was *not* generating sufficient income to either pay its operating expenses or to handle its debt service. This was known to all of the parties involved both prior to and at the time of the final closing and was the reason for negotiating a moratorium.

About a week before the final closing of the loan on the apartment complex, Thornton met with Marsh Cunningham (Cunningham), Director of Rental Housing for the FHA, in Washington, D. C. This conference was in part precipitated by the concern of the FHA that if they permitted 21 to close the loan it could immediately thereafter walk away from the project without any liability for payment of the note and mortgage. Cunningham wanted the promise of 21 that, if the FHA permitted the closing, 21 would not take this action. Thornton, knowing of the financial condition of 21, inquired as to how 21 would recover any losses it might incur in operating the project. Cunningham informed Thornton that these could be recovered under a regulation which permitted the mortgagor to obtain an increase in mortgage amount for operating losses, including principal and interest, which it might incur during the first two years of operation. Thornton, being promised by Cunningham that this would take place, agreed for 21 that it would not walk away from the project but would continue to operate it and attempt to make it a success. Upon reaching Albany on or about November 24, 1964, Thornton informed Trombly and Furlong of this requirement by the FHA and asked if they, meaning the Bank and the Teachers, would promise that 21 would

recover its operating losses under this provision of the regulation. They both agreed that 21 would recover its losses under this provision of the regulations if 21 would stay in and operate the project.

This discussion took place immediately prior to the final closing of the permanent loan. As a result of an injunction issued by the District Court of Tarrant County, Texas, the loan was closed on the last stated date but all closing papers were placed in escrow until the injunction could be dissolved. In due course the injunction was dissolved and the final closing papers were disbursed to the parties.

The promise alleged by 21 was confirmed by Dee.

In reliance upon this promise Manhattan advanced to 21 the sum of approximately $850,000.00 for the period commencing in November of 1964 and ending in March of 1967 for the purpose of covering 21's operating losses for that period.

Pursuant to this promise, 21 filed with the Teachers, in September of 1966, an application for an increase in mortgage amount to cover these losses. This application for mortgage increase was approved by the Teachers on November 17, 1966. This application was then jointly submitted by the Teachers and 21 to the FHA and the FHA approved the application on or about January 23, 1967.

Even after the formal application was approved by the Teachers Manhattan advanced to 21 the sum of $72,159.81 on January 30, 1967, the sum of $10,000.00 on February 22, 1967, and the sum of $18,539.64 on March 15,

1967, a total of $100,699.45. Thereafter the Teachers informed 21 that it would not advance the amount of 21's losses for the period from November, 1964 to March of 1967.

Although Thornton did not meet other officials of the Teachers until the early part of 1965, he did from that time on have many conversations with Murray and Munkwitz, all concerning the advances of funds by Manhattan to 21 to cover operating losses and the subsequent reimbursement of these losses in the form of a mortgage increase. At no time did these officials disaffirm this promise but rather confirmed it in all respects. There was no reason for Thornton to have met officials of the Teachers prior to the early part of 1965 since Trombly and Furlong represented them in the closing of the permanent loan and there was no necessity for the other officials of the Teachers to be present since no papers were to be signed by them. Furlong, on behalf of the Bank, made an assignment of the permanent loan to the Teachers. It is well to note that the moratorium on principal and interest (to the extent of 4%) payable under the permanent loan was negotiated by Thornton with Trombly.

Thus, this appeal primarily concerns the enforceability of the promise made by the Teachers to 21 at the time of the final closing in November of 1964 concerning the manner and method in which 21 was to recover its operating losses for a two year period thereafter ensuing.

21 commenced this action in the District Court of Dallas County on August 1, 1967, immediately following

the Trustee's Sale of 21's property under and by virtue of the Deed of Trust previously executed by 21 to the Bank and subsequently assigned to the Teachers. Jurisdiction was obtained by Writ of Attachment. The writ attached the real property, i. e., the apartment project of 21, the subject matter of the heretofore referred to Deed of Trust.

The Teachers filed a petition for removal to the Federal Court and attached the Writ of Attachment issued by the State District Court. Upon hearing, the District Court sustained the Teachers' Motion to Quash the Attachment. The order sustaining such motion constitutes one of the specifications of error on this appeal.

Upon sustaining the Motion to Quash the Writ of Attachment, the Court granted 21 time within which to obtain service under Article 2031(b) of the Texas Statutes. This is the so-called "Long-Arm Statute". Process was thereafter issued and served according to that statute. The Teachers attempted to quash this service but was unsuccessful. An answer was filed reserving the issue of the effectiveness of the process and denying generally that the Teachers was subject to service under the Texas "Long-Arm Statute".

Thereafter, additional pleadings were filed by 21 and Teachers and additional discovery was had by both parties—culminating in the Teachers filing a Motion to Dismiss Action or for Judgment on the Pleadings or for Summary Judgment. This motion was controverted by 21's Response to Defendant's Motion to Dismiss Action or for Judgment on the Pleadings or for Summary Judgment and

its Amended Response to Defendant's Motion to Dismiss Action or for Judgment on the Pleadings or for Summary Judgment. Upon hearing, Teachers' motion was sustained and an order and final judgment was entered. The sustaining of this motion will constitute another specification of error in this appeal.

It was not clear in the Court of Appeals' opinion, rendered on May 11, 1970, why the Court of Appeals rejected the application of the Doctrine of Promissory Estoppel except to say that "Promissory estoppel is simply not in the case". A Petition for Rehearing was granted and as a result thereof the Court of Appeals' opinion was rendered on September 22, 1970. In this opinion the Court supported its statement that "Promissory estoppel is simply not in the case" by holding that under Texas law Comment f to §178, Restatement of Contracts, must be considered concomitant with §90 when dealing with oral promises coming within the Statute of Frauds.

VI

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

Jurisdiction of this case in the United States District Court for the Northern District of Texas was founded on diversity of citizenship and amount. Respondent is a corporation incorporated under the laws of the State of New York, having its principal place of business in Albany, New York. Petitioner is a Limited Partnership formed under the Texas Uniform Limited Partnership Act with its principal place of business in Dallas, Texas. The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

VII

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

The principle issue is whether the Circuit Court correctly held that in Texas the Doctrine of Promissory Estoppel overrides the Statute of Frauds only in those instances where there exists an additional promise to reduce the promise to writing. The Doctrine of Promissory Estoppel as enunciated by the Texas Courts is not so limited. The Doctrine of Promissory Estoppel was adopted in Texas in the case of *Wheeler v. White*, 398 S. W. 2d 93, (Tex. Sup. Ct. 1965) (Reh. den. 1966), to-wit:

> ". . . where one party has by his words *or conduct* made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise cannot afterward be allowed to revert to the previous relationship as if no such promise had been made. This does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them." See 1 Williston, Contracts, §§ 139-40 (Rev. ed. 1936); and 48 A.L.R. 2d 1069 (1956). (Emphasis added.)
>
> "The function of the doctrine of promissory estoppel is, under our view, defensive in that it estops the promisor from denying the enforceability of the promise."

And again, on page 97, the Court said:

> "Where the promisee has failed to bind the promisor

> to a legally sufficient contract, but where the promisee has acted in reliance upon a promise to his detriment, the promisee is to be allowed to recover no more than reliance damages measured by the detriment sustained. Since the promisee in such cases is partially responsible for his failure to bind the promisor to a legally sufficient contract, it is reasonable to conclude that all that is required to achieve justice is to put the promisee in the position he would have been in had he not acted in reliance upon the promise".

The vital principle of the Doctrine of Promissory Estoppel is that he who by his language *or conduct* leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by destroying the expectations upon which he acted. Thus, by the very quote of the Court in *Wheeler v. White*, supra, conduct alone, without a promise, makes it quite clear that a second promise to reduce a previous promise to writing is not necessary and therefore shows more vividly the misapplication by the 5th Circuit of this doctrine as interpreted by the Texas Supreme Court. The elements of the Doctrine are:

(1) a promise or conduct;

(2) intent to induce reliance on the promise or conduct;

(3) good faith reliance on the promise or conduct; and

(4) detriment to the promisee.

In a case where there is a confrontation between the Doctrine of Promissory Estoppel and the Statute of Frauds, promisory estoppel will override the Statute of Frauds if injustice can be avoided only by enforcing the promise.

The rationale behind this rule is simple. The Doctrine of Promissory Estoppel and the Statute of Frauds were both designed to prevent fraud and if the Statute of Frauds is applied in a case where the Doctrine of Promissory Estoppel is applicable, the Statute of Frauds becomes a vehicle by which fraud is accomplished. If the Statute of Frauds is applied so as to render unenforceable a promise, upon the faith of which a promisee has relied to his detriment, the promisee is defrauded. Only the enforcement of the promise under the Doctrine of Promissory Estoppel can prevent the promisee from being defrauded. (*Trinity Universal Ins. Co. v. Ponsford Bros.*, 414 S.W. 2d 16 (Tex. Civ. App. 1967); aff'd 423 S.W. 2d 571 (Tex. Sup. Ct. 1968); *Mercantile National Bank at Dallas v. Hudgens*, 412 S.W. 2d 364 (Texas 1967); *Cooper Petroleum Company et al., v. LaGloria Oil and Gas Co.*, 436 S.W. 2d 889 (Tex. Sup. Ct. 1969); 49 Am. Jur., *Statute of Frauds*, Sec. 579 and subsequent sections. Since the design of the Statute of Frauds is to prevent fraud it seems reasonable that an oral promise should be enforced where it is found that such promise was made, that such promise was made with intent to induce reliance and detrimental reliance resulted. In such a case, insofar as the promisor is concerned, there exists none of the dangers which the Statute of Frauds was designed to avoid. Rather, the rights of the promisee hang in the balance. It is on this reasoning and logic alone that the Texas Supreme Court, in the case of *Cooper Petroleum Company, et al. v. LaGloria Oil and Gas Co.*, supra, held that because the Doctrine of Promissory Estoppel was applicable the Statute of Frauds could not be raised as a defense. The Court stated:

"The promise in this instance was given for the pur-

> pose of inducing and it did induce LaGloria to continue making sales on credit to I.M.I. On the present record it is clear that injustice can be avoided only by enforcing the promise. Under the doctrine of promissory estoppel . . . he is precluded from asserting that the same [i.e., his oral guarantee] is unenforceable with respect to deliveries made in reliance thereon." (Citing *Wheeler v. White.*)

It is submitted that when the Circuit Court held that the Doctrine of Promissory Estoppel overrides the Statute of Frauds only in those cases where there exists an additional promise to reduce the oral guarantee to writing, it gave effect only to form, ignored substance, and allowed the Statute of Frauds to be used as an instrumentality for the perpetration of frauds.

One of the Counsel in this Petition for Writ of Certiorari was counsel of record in Cooper Petroleum Company, et al., v. LaGloria Oil and Gas Co., supra, and advises this Court that the existence of the promise to reduce the guarantee to writing was not considered to be necessary for the application of the Doctrine of Promissory Estoppel to the facts in that case; that irrespective of the existence of the promise to reduce the guarantee to writing the Texas Supreme Court opinion would have been the same. The existence of the promise to reduce the guarantee to writing was not considered nor was it argued that this additional promise be present before the Doctrine of Promissory Estoppel could be utilized.

The leading article on the Doctrine of Promissory Estoppel is *Promissory Estoppel and Traditional Contract Doctrine*, The Yale Law Journal, Vol. 78, page 343, Janu-

ary, 1969. This article traces the historical development of this doctrine as well as its expanding present application. Nowhere is it stated that for this doctrine to be applicable to a situation as present here is it necessary that there be an additional promise to reduce the promise to writing.

It has been said that equitable estoppel and promissory estoppel are one and the same, with the only difference being that in equitable estoppel there is a misrepresentation of a past or present fact, whereas in promissory estoppel there is a promise to do something in the future. Nowhere in the application of equitable estoppel, which basically deals with land contracts, is there a requirement that there be an additional promise of reducing the earlier promise to writing. It is submitted that the reason for this lack of a second promise is that it is superfluous. This equitable estoppel has also been defined as the part performance doctrine. Some Courts have used the term "equitable estoppel" for the term "promissory estoppel". See *Oxley v. Ralston Purina Co.*, 349 F. 2d 328 (6th Cir. 1965). The decision in this case is directly opposed to the decision rendered by the 5th Circuit on September 22 and thus there is a conflict between the various Circuits with respect to the proper application of the Doctrine of Promissory Estoppel and is a sufficient reason for the granting of the Petition for Writ of Certiorari.

In the *Oxley* case, Oxley brought an action against Ralston Purina for damages sustained from alleged breach of oral contract dealing with a hog leasing program. The oral agreement provided that the plaintiff was to begin a hog leasing program on his farm with the defendant to later take and dispose of the plaintiff's surplus stock. This agree-

ment was not to be performed within one year. The plaintiff plead that this agreement should be enforced against the defendant under the theory of equitable estoppel where the plaintiff relied on such agreement and made extensive investments for the purpose of carrying the agreement out. The lower court held for the plaintiff and the appellate court sustained. On appeal, the defendant argued that an oral contract which cannot be performed in one year although substantially performed by plaintiff was void under the Michigan statute of frauds and further contended that the doctrine of equitable estoppel does not apply to an oral contract not performable within one year where no fraud or conveyance of real estate is involved.

In discussing part performance and equitable estoppel the Court stated:

> "We must note at this point that though the doctrine of part performance has its basis in an estoppel, part performance and equitable estoppel are not the same. The doctrine of part performance has historically been applied only to contracts involving the sale of land, whereas the doctrine of equitable estoppel is more encompassing. Under that doctrine the principal is that " 'he who by his language or conduct leads another to do, upon the faith of an oral agreement, what he would not otherwise have done, and changes his position to his prejudice, will not be allowed to subject such person to loss or injury, or to avail himself of that change to the prejudice of such other party.' "

The Court then stated that the New York statute of frauds and the Michigan statute of frauds were substantially the same and further noted that though the New York courts, as Michigan courts, have stated that oral contracts void under the statute of frauds are void for all purposes,

these same courts have in various cases not involving real property applied the doctrine of equitable estoppel. It cited a New York case, *M. H. Metal Products Corporation v. April*, 167 N.E. 201 (Ct. of App. 1929), which held that the defendant, by his conduct, or by his agreement, which has induced another to incur expense and alter his position to his damage, cannot hide behind the statute of frauds. The Court further stated:

> "We find, after reviewing the foregoing New York cases, that the doctrine of equitable estoppel has been applied by some New York courts in oral contract cases not involving real estate to prevent a defendant from relying upon the defense of the statute of frauds. And we do not believe that the application of the doctrine of equitable estoppel in such cases is incongruous with the holding that contracts void under the statute of frauds are 'void for all purposes'. The reason for this is that when the doctrine of equitable estoppel is invoked, defendant is precluded from asserting the statute and therefore the oral contract does not become 'void for all purposes.' Stated another way, the oral contracts which we are considering become void because of the application of the statute of frauds and if the defendant is denied the right to assert the statute, the oral contracts exist as if there were no such statutes."

The Court then went on to say:

> "As previously stated, he applied the general rule that the doctrine of equitable estoppel applies in those cases where its aplication is called for by the facts. That rule, applied to the statute of frauds, is stated by Williston as:
>
> > 'Where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may

> be raised to defeat the defense of the Statute of Frauds. This is based upon the principle established in equity, and applying in every transaction where the Statute is invoked, that the Statute of Frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme. It is called into operation to defeat what would be an unconscionable use of the Statute, and guards against the utilization of the Statute as a means for defrauding innocent persons who have been induced or permitted to change their position in reliance upon oral agreements within its operation.'

Williston also quotes the following with approval:

> 'We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than . . . that it applies 'in every transaction where the statute is invoked.' "

In stating that the fraud, in the usual sense, is not required, the Court, in quoting Williston, stated:

> "The fraud most commonly treated as taking an agreement out of the Statute of Frauds is that which consists in setting up the Statute against its enforcement after the other party has been induced to make expenditures or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired, so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer,

but the infliction of an unjust and unconscionable injury and loss."

He further states:

"Actual intent or design to mislead is not, however, essential. There need not be a corrupt motive or evil design; it is sufficient if the circumstances are such as to render it unconscionable to deny facts which the party by his silence or representation has caused the other party to believe in and act upon, and the denial of which must operate as a a fraud upon him."

In assessing the damages, the Court found, in effect, that the plaintiff should recover the losses incurred in relying on the oral promise of the defendant.

It is submitted that the equitable estoppel that the court relied on in *Oxley v. Ralston Purina Company* is basically promissory estoppel. Be that as it may, doctrines of estoppel and promissory estoppel have long precluded objections to non-compliance with the statute. Restatement Contracts, Sec. 178, comment f at 234-35. This is the Section of the Restatement which the Teachers have cited as authority for the fact that not only must there be an oral promise that falls within the statute but also a promise to reduce it to writing before it could be enforced. This is absolutely contrary to the provisions of the cited sections of the Restatement. Sub-section f of Section 178 is quoted as follows:

"f. Though there has been no satisfaction of the Statute [of Frauds], an estoppel may preclude objection on that ground in the same way that objection to the

non-existence of other facts essential for the establishment of a right or a defense may be precluded. A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it was false; and a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud."

This section clearly recognizes that promissory estoppel will operate if there was a promise to make a memorandum. It does not say that in order for an oral promise (which falls within the statute), must also be accompanied by an additional promise to reduce it to writing.

to be enforceable, it

CONCLUSION

This Court should accept jurisdiction to correct the mistaken application by the 5th Circuit Court of Appeals of the Doctrine of Promissory Estoppel as defined by the Texas Supreme Court. It should likewise accept jurisdiction to settle the contrary decisions between the Circuits as evidenced by the decision of the Court of Appeals of the 5th Circuit in this case and the decision of the 6th Circuit in the case of *Oxley v. Ralston Purina Co.*, supra. It is submitted that the facts of this case present a situation in which the Statute of Frauds should not be utilized to defraud a party who has relied to his detriment on an oral promise.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27640

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21 TURTLE CREEK SQUARE, LTD.,
Plaintiff-Appellant,

versus

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(September 22, 1970)

ON PETITION FOR REHEARING

Before RIVES, GEWIN and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: The court, having received a petition for rehearing in the above entitled and numbered cause and having considered the briefs of counsel filed in response thereto, modifies its opinion of May 11, 1970, by deleting the following language on page 13 of the opinion:

"From Thornton's testimony, most favorable to 21, we must look to what Mr. Cunningham, representing FHA told him, that he could not give an agreement under the circumstances, 'with all the trouble this project has had and have us committed to pick up your losses for you staying in there, in writing.' FHA did not approve an additional loan in any amount. By the undisputed evidence, the failure was in the performance of 21. Promissory estoppel is simply not in the case."

In its place, the court substitutes the following:

While Texas does recognize the applicability of the above quoted section of the statement — that is not to say its applicability is without limitation. Thus when the particular case, as here, involves the Statute of Frauds, there exists the further requirement of reliance upon a second promise — a promise to reduce the first promise to writing. That the courts of Texas require this additional promise to remove an oral, and thus unenforceable, promise from the Statute of Frauds before promissory estoppel may apply is apparent from the latest pronouncement of the Texas Supreme Court on the subject in *Cooper Petroleum Co. v. La Gloria Oil & Gas Co.*, 436 S.W. 2d 889 (Tex. 1969).

In *Cooper Petroleum*, involving the promise to guarantee payment of certain business accounts, the court had the following to say:

"According to the evidence and the jury's findings, the *promise was to sign a written guaranty*, and a written guaranty would have been enforceable. In previous dealings LaGloria had acted on oral promises that Cooper Petroleum would g u a r a n t e e payment of I.M.I.'s accounts, and the written guaranties were furnished later. The promise in this instance was given for the purpose of inducing and it did induce LaGloria to continue making sales on credit to I.M.I. On the present record it is clear that injustice can be avoided only by enforcing the promise. Under the doctrine of promissory estoppel, therefore, and to the extent that Clark's promise is binding on Fagan, he is precluded from asserting that the same is unenforceable with respect to deliveries made in reliance thereon. Wheeler v. White, Tex. Sup., 398 S.W. 2d 93; Restatement of Contracts § 90, *§178 and Comment f*." 436 S.W. 2d at 896 (Emphasis supplied).

From the court's holding, it can be clearly discerned that Comment *f* to §178, Restatement of Contracts must be considered concomitant with §90 when dealing with oral promises coming within the Statute of Frauds. Comment *f*, §178 reads in pertinent part:

"Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground . . . . A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representa-

> tion, precludes proof by the party who made the representation that it was false; and a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud."

Thus, under §178, the defense of the Statute of Frauds is only precluded when there has been (1) a *misrepresentation* that the Statute's requirements have been complied with, or (2) a promise to make a memorandum.

From the undisputed evidence and Thornton's testimony most favorable to 21, it is manifest that there was neither a misrepresentation by Teachers that the requirements of the Statute of Frauds had been complied with nor was there a promise to make a memorandum. To the contrary, it is undisputed that Mr. Cunningham, representing the FHA and Trombly and Furlong, representing Teachers, specifically and unequivocally refused to make such a writing. As Mr. Cunningham stated, "I couldn't give you that agreement under these circumstances with all the trouble this project has had and have us committed to pick up your losses for you staying in there in writing."

Appellant contends that the above analysis of promissory estoppel in Statute of Frauds cases is incorrect and cites as authority, *Aubrey v. Workman*, 384 S.W. 2d 389 (Tex.Civ.App., Ft. Worth 1964, writ ref'd n.r.e.). Yet, in that case, the court quoted with approval the

following language from *Alaska Airlines v. Stephenson*, 217 F.2d 295 (9th Cir. 1954):

> The foregoing section (§90), not mentioning promissory estoppel, is addressed not to the statute of frauds but to promissory estoppel as a substitute for consideration. However, when one considers the part Samuel Williston took in the formulation of the Restatement of Contracts and then examines Section 178, Comment f., one must conclude that there was an intention to carry promissory estoppel (or call it what you will) into the statute of frauds if the additional factor of a promise to reduce the contract to writing is present. Williston on Contracts, 1936 Ed., Sec. 533A."

Appellant also relies on the case of *Trinity Universal Ins. Co. v. Ponsford Bros.*, 414 S.W. 2d 16 (Tex.Civ. App., El Paso 1967), *aff'd on other grounds*, 423 S.W. 2d 571 (Tex. 1968), and *Wheeler v. White*, 398 S.W. 2d 93 (Tex. 1966). However, the above cases are inapposite to our consideration of the case at bar. In *Trinity*, the court alluded to promissory estoppel, but it is clear that its holding is predicated upon the fact that a promise, although oral, is not within the Statute of Frauds when the main purpose of the promisor is to subserve some purpose of his own. Thus, estoppel could apply but only after the promise to answer for the debts of another has been removed from the Statute of Frauds under the "main purpose" or "leading object rule". Likewise, in the case of *Wheeler v. White, supra*, the Statute of Frauds was not in issue.

From an examination of the authorities above discussed, we are compelled to the conclusion that under the facts here presented most favorable to 21, Teachers was entitled to judgment as a matter of law and that promissory estoppel under §90 is simply not in the case.

Because a contrary result would not obtain under New York law, we are not presented with a question of conflict of laws.

In all other respects, the petition for rehearing is DENIED.

B1

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27640

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21 TURTLE CREEK SQUARE, LTD.,
Plaintiff-Appellant,

versus

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

(May 11, 1970)

Before RIVES, GEWIN and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: 21 Turtle Creek Square, Ltd., (21), plaintiff below and appellant herein, is a Texas limited partnership. This entity was formed for the purpose of owning, developing and operating a high rise apartment complex in Dallas, Texas. Appellee, New York State Teachers' Retirement System (Teachers), is a body corporate organized and existing under the Education Laws of New York.

In order to finance construction, 21 obtained a loan from Teachers in 1962 in the amount of $9,910,900.00, said loan being insured by the Federal Housing Administration under the National Housing Act and secured by two deeds of trust and real estate mortgages covering the property. The interim construction loan disburser (Disburser) was the National Commercial Bank and Trust Company of Albany, N. Y. Disburser owned 10% of the construction loan and Teachers owned 90%, pursuant to a participation agreement. Various complications delayed the final closing of the loan, which was finally culminated in November of 1964.

The cause of action asserted by the plaintiff-appellant in this case arises from conversations which 21 contends occurred shortly before the final closing of the loan. It is alleged that the FHA was concerned that if they permitted 21 to close the loan, 21 might immediately thereafter walk away from the project without any liability for payment of the note and mortgage. The Director of Rental Housing for the FHA informed Thornton, the attorney representing 21, that there was a regulation which permitted the mortgagor to obtain an increase in mortgage amount for operating losses which it might incur during the first two years of operation. 21 claims that in order to induce it to remain in operation of the project, an oral promise was made by the attorneys representing the Disburser and Teachers, upon which 21 had a right to rely and did rely and which Teachers is estopped to deny, that Teachers would increase the amount of the loan secured by the mortgage so that 21 would be repaid all operating losses incurred by it for the two-year period.

In March of 1967, Teachers refused to close the increased loan allegedly because of certain title defects. In July of 1967, Teachers instituted foreclosure proceedings where it made the highest bids, thus resulting in the sale of the property to Teachers.

21 commenced this action in the state District Court of Dallas County on August 1, 1967, obtaining jurisdiction over Teachers by a writ of attachment of the real property of the apartment project. Teachers filed a petition for removal to the Federal District Court and attacked the writ of attachment. The District Court sustained the motion to quash the writ. Thereafter, 21 procured service upon Teachers through service upon the Texas Secretary of State under the long-arm statute. The District Court overruled Teachers' motion to dismiss for lack of jurisdiction, but granted its motion for summary judgment. It was ordered that 21's complaint be dismissed, that plaintiff take nothing against defendant and that a partial summary judgment be granted defendant on its counterclaim.

The issues presented on appeal are: (1) Did the trial court err in refusing to dismiss this action for lack of jurisdiction; (2) Did the trial court properly quash the writ of attachment issued by the state District Court; and (3) Did the trial court err in granting summary judgment in favor of defendant-appellee.

I

JURISDICTION

After the district court quashed the writ of attachment, 21 was permitted to, and did, procure service upon Teachers as related above. We hold that the district court had in personam jurisdiction over the defendant-appellee, Teachers, under the provisions of Art. 2031b, Revised Civil Statutes of Texas (long-arm statute). Although the contract was executed in New York, Teachers' performance by advancing money for the development of specific property in Texas, looking to its operations for payment, followed by foreclosure, was "doing of business" under the holding in *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69 (5th Cir. 1961).

II

WRIT OF ATTACHMENT

Plaintiff in its original petition alleged that it had a legally enforceable contract with defendant, which the defendant had refused to perform, and that it suffered damages in the amount of $3,000,123 because the defendant "does now wilfully, wrongfully and fraudulently continue to refuse to perform its obligations under said contract and make the said additional loan of $1,525,800.00." It prayed for exemplary damages in the additional amount of $3,000,000, and for attorney's fees, without alleging any amount.

In its affidavit for the writ of attachment, the plaintiff stated that the defendant was justly indebted to it in the amount of $6,000,123 (the total of the actual and exemplary damages, without reference to its suit for

attorney's fees), and that the defendant was a foreign corporation.

Plaintiff's suit is one for damages, exemplary damages and attorney's fees, based upon alleged breach of contract and willful, wrongful, wanton and fraudulent actions. Although a sum certain is sued for as alleged damages, a sum certain is not sued for as attorney's fees. The damages claimed are not liquidated damages, but damages which must be submitted to a jury, or a court within its fact-finding powers, for ascertainment.

The longstanding rule in Texas has been that the writ of attachment will not issue in a suit for unliquidated damages. It is the established rule in Texas that while attachments may be maintained in many cases for damages growing out of a breach of contract, even though they are unliquidated, such attachments cannot be allowed in all such suits for damages. The Texas courts hold that, where unliquidated damages are demanded, the contract alleged as the cause of action must afford a rule for ascertaining the damages, so that the amount with propriety can be averred in the affidavit. If the amount of unliquidated damages claimed are so uncertain that the amount cannot be determined until a jury shall have ascertained it, then attachment will not lie. This rule has been uniformly followed in Texas and has never been questioned. *Hochstadder v. Sam*, 73 Tex. 315, 11 S.W. 408 (1889); accord, *Kildare Lumber Co. v. Atlanta Bank*, 91 Tex. 95, 41 S.W. 64 (1897); *El Paso National Bank v. Fuchs*, 89 Tex. 197, 34 S.W. 206 (1896); see also *Gimbel v. Gomprecht*, 89 Tex.

497, 35 S.W. 470 (1896); *Avery v. Zander*, 77 Tex. 207, 13 S.W. 971 (1890).

This rule is still viable, as exemplified by more recent cases in which the rule has been held to be applicable to cases in garnishment. *Cleveland v. San Antonio Building & Loan Ass'n*, 148 Tex. 211, 223 S.W.2d 226 (1949); see also *Butler, Rinehart & Morrison v. McDaniel*, 288 S.W.2d 188 (Tex. Civ. App. — Dallas 1956, error ref'd n.r.e.); *Thomas v. Buehler*, 254 S.W.2d 223 (Tex. Civ. App. — Austin 1953).

Art. 281, Vernon's Annotated Texas Civil Statutes (1913), provides:

> "Nothing in this title (Title 13) shall prevent the issuance of attachments in suits founded in tort or upon unliquidated demands against persons, co-partnerships, associations or corporations upon whom personal service cannot be obtained within this State."

Attachment is a statutory remedy and its validity does not depend upon the truthfulness of the allegations of the affidavit or petition, but upon the compliance with the statute in making the affidavit. *Gimbel v. Gomprecht, supra*. The affidavit in the instant case alleges that defendant is a foreign corporation but does not allege that personal service cannot be obtained within the state. Plaintiff must state truly whether its debt is due in whole or in part, and if due in part only, it must state what part is due and what part is not due. *Avery v. Zander, supra*. The affidavit does not satisfy the requirements of the statute.

It should be noted that no cases were cited by appellant on this issue.

We hold that the district court properly quashed the writ of attachment, but it becomes immaterial, considering the disposition of the case by summary judgment, hereinafter.

III

SUMMARY JUDGMENT

The district court granted summary judgment for defendant, upon its motion. It is provided by Rule 56, F.R.Civ.P. that either party may move for summary judgment if it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Plaintiff's complaint alleges that the agreement for additional financing was based upon an oral agreement with plaintiff that in consideration of plaintiff's closing the permanent financing and continuing to operate the property, the defendant would make the loan increase to plaintiff to cover plaintiff's operating losses for the first two years of operation of the apartment project beginning August 1, 1964, as contemplated by the Federal Housing Administration regulations and in an amount which would be approved by the F.H.A.

It is undisputed from the pleadings, the depositions on file and the supporting affidavits that (1) F.H.A. did not approve an additional loan in any amount, and (2) Teachers' agreement to make the additional loan

was an oral agreement, not supported by any writing, formal or informal.

Mr. David M. Thornton, attorney for 21, testified by deposition to conversations with Mr. Cunningham, representing the F.H.A., and with Messrs. Furlong and Trombly, representing Teachers, as follows:

"Q Did you ask Mr. Cunningham for a confirmation in writing of the FHA's agreement?
"A Sure did.
"Q Did you get it?
"A No.
"Q Why did he tell you he wasn't going to give it to you?
"A Just the same reason Dee didn't want my letter.
"Q What did Mr. Cunningham say to you?
"A Mr. Cunningham said, 'I couldn't give you that agreement under these circumstances with all the trouble this project has had and have us committed to pick up your losses for you staying in there in writing.'
"Q All right. Mr. Thornton, after you had this discussion with Furlong and Trombly and they had made this promise, did you ask them to confirm it in writing?
"A Yes, I did.
"Q And what did they say?
"A The same reason Cunningham gave.
"Q What, specifically? State the reason.
"A Well, at that time, you recall, and subsequent to that time there were all kinds of

publicity about Gevinson and there was quite a bit of complaints to the Teachers and to the bank about this loan, and this kind of a deal is — would not look very good.

"Q So they refused to put it in writing?

"A That's right.

"Q In other words, you asked for it in writing and they refused to put it in writing?"

(Depo. of David M. Thornton, p. 51, line 10, to p. 52, line 12)

The witness also testified in the deposition that no one heard the agreement made with Cunningham or the conversation between him and Furlong and Trombly. (pp. 52-53) The following statement made by the witness is also significant:

"A I don't like the word 'agreement' you keep on using, so I might as well get the record straight on that. I don't think it was an agreement. It was a promise on their part, both of them, to do certain things if we stayed in there and operated and managed the property. . . ."

((Depo. of David M. Thornton, p. 54, line 15-19)

Thornton also testified:

"Q Then without going through your other pleadings, the basis of your present lawsuit is those two statements, one made by Cunningham to you and the other made by Furlong and Trombly; is that right?

"A Promises made, plus the fact of our staying in there and doing that.

"Q I understand. But the point about it is that these conversations, one with Cunningham sometime before November 24 —

"A Yes.

"Q — and the conversations with Trombly and Furlong on November 24, are the basis of your lawsuit?

"A Yes, sir.

(Depo. of David M. Thornton, p. 59, lines 12-23)

Plaintiff's cause of action, according to its pleadings and the undisputed facts, is barred by the Statute of Frauds, codified into the laws of Texas, Art. 3995, Vernon's Annotated Texas Civil Statutes, as follows:

Article 3995. [3965] [2543] [2464] Writing required

No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized:

1. To charge any executor or administrator upon any promise to answer any debt or damage due from his testator or intestate, out of his own estate; or,

2. To charge any person upon a promise to answer for the debt, default or miscarriage of

another; or,

3. To charge any person upon any agreement made upon consideration of marriage; or,

4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or,

5. Upon any agreement which is not to be performed within the space of one year from the making thereof. Acts 1840, p. 28; P.D. 3875; G.L. vol. 2, p. 202.

The oral promise asserted by Thornton's testimony is clearly within the statute. Not only is the agreement not in writing but, according to Thornton's testimony, defendant refused to put it in writing, and plaintiff was on notice of it from such time. According to the testimony, the oral promise was made on November 24, 1964. And Thornton further testified, at page 44 of his deposition:

[44] Then Cunningham had told you in Washington — did Cunningham agree on behalf of FHA at that time that they would do it?

A. Yes, he did. He said, "If you will stay in there and operate this project and keep it going, subject to everything else being all right at the end of two years, we will give you a mortgage increase."

Q. Did you understand that that was a firm agreement between you and Cunningham at that time?

A. I certainly did, subject to us being in there and operating the place.

Q. And no other conditions?

A. No.

Q. All you had to do was operate for two years, and you thought that was an agreement for an automatic mortgage increase; is that right?

A. That's right.

Q. And then you went down and told Mr. Bullen and Mr. Fortenberry that you had a firm agreement with FHA that at the end of two years they were going to give you a mortgage increase to pick up the amount of your operating losses, if you had any; is that right?

A. I had a firm promise, as far as I am concerned, from Mr. Cunningham, that the FHA would approve this if we did [45] these things.

The Statute of Frauds bars plaintiff's claim based upon the oral agreement. It involves a mortgage of real estate. A mortgage or other lien upon real estate cannot be given by parol. *West v. First Baptist Church of Taft*, 123 Tex. 388, 71 S.W.2d 1090 (1934); *Allen v. Allen*, 101 Tex. 362, 107 S.W. 528 (1908); *Home Investment Co. v. Fidelity Petroleum Co.*, 249 S.W. 1109 (Tex. Civ.App.,Dallas 1923, err.ref.); *Aaron Frank Clothing Co. v. Deegan*, 204 S.W. 471 (Tex.Civ.App., San Antonio 1918, err.ref.). The Statute of Frauds further bars the claim based upon the oral agreement as an agreement not to be performed within the space of one year from the making thereof. *Paschall v. Anderson*, 127 Tex. 251, 91 S.W.2d 1050 (1936); Accord, *Chevalier v. Lanes, Inc.*, 147 Tex. 106, 213 S.W.2d 530 (1948).

The oral and unenforceable promises of Teachers' representatives, Furlong and Trombly, do not raise

an estoppel against Teachers to assert the Statute of Frauds. Sec. 90, Restatement of Contracts, recognized by Texas and other jurisdictions as a statement of the doctrine of promissory estoppel, reads as follows:

> "A promise which the promisor should reasonably except to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

From Thornton's testimony, most favorable to 21, we must look to what Mr. Cunningham, representing FHA told him, that he could not give an agreement under the circumstances, "with all the trouble this project has had and have us committed to pick up your losses for you staying in there, in writing." FHA did not approve an additional loan in any amount. By the undisputed evidence, the failure was in the performance of 21. Promissory estoppel is simply not in the case.

The judgment of the district court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-2208

21 TURTLE CREEK SQUARE, LTD.,
Plaintiff,

vs.

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,
Defendant.

ORDER AND FINAL JUDGMENT

This cause having come on to be heard on the motion of the defendant, New York State Teachers' Retirement System, "to Dismiss Action or For Judgment on the Pleadings or For Summary Judgment"; and the Court having considered the pleadings, the depositions on file in this cause, with the exhibits to said depositions, all of the records, files and proceedings in this cause, and the supporting affidavits, as well as the response of the plaintiff, 21 Turtle Creek Square, Ltd., to defendant's motion and plaintiff's affidavits in support of its response; and the Court having heard the argument of counsel and due deliberation having been had thereon; it is

ORDERED that the defendant's Motion for Summary Judgment on the main action be and the same is hereby granted; and it is further

ORDERED that defendant's Motion for Summary Judgment in its favor as cross-plaintiff on its counterclaim be partially granted as to the sum of $11,618.12 and be denied as to the balance of said counterclaim;

And it appearing to the Court that the defendant and cross-plaintiff, New York State Teachers' Retirement System, in open court, waived its counterclaim for any sum in excess of $11,618.12; and the Court having expressly determined that there is no just reason for delay, and that this Court should expressly direct the entry of judgment to terminate this action; it is, therefore, further

ORDERED, ADJUDGED, and DECREED by the Court that the complaint of plaintiff, 21 Turtle Creek Square, Ltd., herein be dismissed on the merits and that plaintiff take nothing against the New York State Teachers' Retirement System, defendant; and it is further

ORDERED, ADJUDGED, and DECREED by the Court that the defendant and cross-plaintiff, New York State Teachers' Retirement System, recover of and from the plaintiff and cross-defendant, 21 Turtle Creek Square, Ltd., the sum of $11,618.12, and that it be denied recovery on its counterclaim for any sum in excess of $11,618.12; and it is further

ORDERED, ADJUDGED, and DECREED by the Court that all relief prayed for by either party and not expressly granted by the foregoing provisions of this judgment be in all things denied; and it is further

ORDERED, ADJUDGED, and DECREED by the Court that the defendant, New York State Teachers' Retirement System, recover of and from the plaintiff, 21 Turtle Creek Square, Ltd., its costs of action.

SIGNED AND ENTERED this 11th day of February, 1969.

/s/ SARAH T. HUGHES

United States District Judge